

16 APR 1976

MEMORANDUM FOR: Chairman, USIB Security Committee

SUBJECT : Status Report, Security Committee on
Nondisclosure Agreements

1. In accordance with your tasking at the 30 March 1976 Security Committee meeting, the Ad Hoc Working Group of the Security Committee assigned to develop an implementation plan for Section 7(a) of Executive Order 11905 has held three meetings: on 1, 7, 15 April 1976. Especially in view of our 1 May 1976 tasking deadline, I wish to report to you on the progress the Working Group has made and to call to your attention problems we have encountered.

2. Approach: While we have acknowledged the ultimate need to address an effort to the provisions of Section 7(d) of the Executive Order, in view of the implementation deadline associated with Section 7(a), the latter is our first priority. To the extent possible, the Working Group is trying to take a literal interpretation of the Section 7(a) requirement, viz. to institute a framework whereby all members of the Executive branch and its contractors sign a nondisclosure agreement as a condition of access to information containing sources or methods of intelligence. We have attempted without complete success to avoid discussion of problems of a peripheral or parochial nature related to the implementation of this requirement.

3. Scope: Initially the Working Group had understood its tasking to encompass implementation of Section 7(a) of the Executive Order in the Intelligence Community. This interpretation was broadened, based on your guidance received from the White House to include the entire Executive branch and its contractors.

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4. Definition of Tasking Elements: The Working Group's understanding of its task was the development of instructions to be issued by the Director of Central Intelligence, requiring the implementation of a system of nondisclosure agreements to be signed by all members of the Executive branch, its contractors and their employees given access to information containing intelligence sources and methods. Early discussion in the Working Group dismissed an approach whereby an uniform nondisclosure agreement would be developed for this propose; it was clear that each agency needed flexibility in designing agreements for its own personnel and contractors.

5. On the other hand, there was unanimity in the Working Group that any secrecy agreement used to satisfy the Executive Order requirement must contain key ingredients. Therefore, the first element of our tasking was the identification of key nondisclosure agreement ingredients.

6. Implementation of a system of nondisclosure agreements concerning information containing intelligence sources and methods demands that such information be readily identifiable to individuals signing such agreements. The second element of our tasking, therefore, was the definition of a mechanism to identify information containing intelligence sources or methods.

7. The third element of our tasking was the development of a format to permit the DCI to order implementation of the Executive Order nondisclosure agreement requirement.

8. Format of Promulgation: While formal agreement among the Working Group members has not yet been sought, the promulgation format to be proposed to the DCI will probably consist of three items:

a. A DCI Directive (DCID) which reiterates the requirements of the Executive Order concerning nondisclosure agreements, spells out necessary ingredients in such agreements and establishes a mechanism for appropriately marking information containing intelligence sources and methods.

b. A memorandum from the DCI to USIB principles requesting that they implement the nondisclosure agreement requirement within the sphere of responsibility and report back to the Director by a certain date as to whether they have accomplished this and their progress toward its accomplish;

c. Letters to the heads of non-USIB agencies and departments requesting their implementation of the Executive Order requirement as appropriate and their reporting back to the Director on this implementation.

9. Marking Mechanism: Working Group discussion has identified two possible options to establish a mechanism for identifying information containing intelligence sources and methods:

a. Use of the existing caveat "WARNING NOTICE - SENSITIVE INTELLIGENCE SOURCES AND METHODS INVOLVED."

b. Establishment of a new warning indicator, preferably human readable, e.g., "CONTAINS INTELLIGENCE SOURCES AND METHODS."

The Working Group needs to discuss these options in more detail before it can make a recommendation which way to go. There are advantages and disadvantages to both options. I will report to you more definitely after the choices are scrutinized in individual agencies.

10. Key Agreement Ingredients: The Working Group is unanimous in identifying the following key ingredients for any nondisclosure agreement:

a. Consideration Clause: As reflected in the Marchetti decision in order to provide a legal basis for a nondisclosure agreement a "consideration clause" is essential. While this "consideration clause" with respect to CIA, NSA, and DIA may equate condition of access (or continuing access) with condition of employment, in other agencies the only "consideration clause" possible may be condition of access.

b. Reference to Executive Order 11905: It is clear that nondisclosure agreements in their text should note that fact that they are being executed to satisfy Section 7(a) of Executive Order 11905.

c. Indefinite Validity: The nondisclosure agreement must carefully inform the individual signing that no term is associated with the obligation of non-disclosure, i.e., the individual is bound not to disclose the information even after his employment or other relationship with the sponsor is terminated.

11. Problems: In addition to the key ingredient of the nondisclosure agreement enjoining the unanimous approval of the Working Group, one additional ingredient proposed by CIA has failed to receive acceptance by Working Group representatives of DIA and the Service Intelligence components. Basically, CIA proposes that all agreements executed in implementation of the Executive Order applies to all information "containing sources and methods of intelligence" without regard to whether such information is properly classified. DIA on the other hand wishes to limit these nondisclosure agreements to "classified information" containing intelligence sources and methods.

12. Based on its internal research and specific cases of litigation, CIA wishes to separate the concept of protection of information through the classification process and the protection of information containing sources and methods of intelligence bases on the statutory responsibility of the DCI in the National Security Act of 1947. CIA's experience has suggested that even if a court or the Interagency Classification Review Committee (ICRC) should determine that classified information containing intelligence sources and methods is no longer validly classified under Executive Order 652, nonetheless its release may be denied under the DCI's statutory authority.

13. This item is a issue to the Working Group in that CIA wishes to ensure that nondisclosure agreements be worded to apply to "classified information and information containing sources and methods of intelligence." CIA believes that such wording avoids a positive stand over the signature of the DCI that information containing sources or methods of intelligence must necessarily be classifiable. To the contrary, CIA feels that such wording is silent on the issue.

14. The concern of CIA in this area is not believed parochical, in that fear is expressed that a federal judge might find it difficult in some cases to support the classification of a given intelligence source or method on the basis of damage to the national defense or sensitive foreign relations.

15. DIA's position on this issue is based on its belief that extending the application of nondisclosure agreements to unclassified information, albeit information containing intelligence sources and methods, could be intepreted by a judge as an infringement on first amendment rights. DIA feels that applying the nondisclosure agreement to nothing other than "classified information containing sources or methods of intelligence" implicitly acknowledges the existence of unclassified intelligence sources or methods.

16. Through the assistance of the Office of General Counsel, CIA and the Special Counsel to the DCI, I am attempting a clarification of this issue from the White House. I hope to have such clarification by 19 April, on which date a new meeting of the Working Group has tentatively been scheduled.



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Chairman, Ad Hoc
Working Group